

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i>,)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i>,)	
)	
<i>Defendants.</i>)	
)	

**TYSON FOODS, INC.’s OPPOSITION TO PLAINTIFFS’ MOTION FOR PARTIAL
SUMMARY JUDGMENT—STATEMENT OF UNDISPUTED FACTS (Dkt. No. 2062)**

Defendant Tyson Foods, Inc. (“Tyson”) respectfully submits this response to Plaintiffs’ Motion for Summary Judgment (Dkt. No. 2062) statement of alleged undisputed facts.¹

STATEMENT OF DISPUTED FACTS

4. Disputed. This fact is ambiguous as to the waters to which it refers and the use to which they are put, and the relevant time period. For example, not all IRW waters are used for recreation or for drinking water, and the uses of various waters vary over time. *See* P.I.T. at 2081:20-2083:23 (Ex. 1). These attributes in a million-acre watershed cannot be generalized.

5. Disputed, in part. This fact is ambiguous as to the relevant time period and incorrectly implies that the Arkansas and Oklahoma legislatures applied their respective state laws outside their state boundaries.

6. Disputed. This fact (i) is vague and argumentative; (ii) contains a legal conclusion²; and (iii) cites only the inadmissible opinion of Plaintiffs’ expert.³ The evidence cited does not support the fact as written. Plaintiffs have not sued the entire “poultry industry” but rather selected out-of-state companies. *See* SAC ¶¶6-18. While Defendants are sometimes called integrators because they integrate some aspects of production,⁴ the characteristics of each vary. *See, e.g., infra* at ¶9. Moreover, the vast majority of poultry are raised in the IRW by

¹ The Court authorized Plaintiffs to file a “reasonably sized” motion, *see* Dkt. No. 1846 (Feb. 4, 2009), but did not set the length of any opposition. In order to respond to Plaintiffs’ submission compliant with the local rules, Defendants divided their response between this fact brief, *Defendant Tyson Poultry, Inc.’s Opposition to Plaintiffs’ Motion for Partial Summary Judgment with Regard to Plaintiffs’ Claims Under CERCLA and RCRA*, Dkt. No. 2184 (June 5, 2009), and *Defendant Cobb-Vantress, Inc.’s Opposition to Plaintiffs’ Motion for Partial Summary Judgment With Regard to Plaintiffs’ State Law and Federal Common Law Claims*, Dkt. No. 2185 (June 5, 2009), which all will join. If the Court prefers, Defendants can refile a single, unified brief.

² Legal conclusions are not proper facts under LCvR56.1(b). *See* objection throughout.

³ The evidence is the subject of *Defendants’ Motion to Exclude the Testimony of C. Robert Taylor*, Dkt. No. 2078 (May 18, 2009).

⁴ *See* Ex. 2 at 8-10, *see, e.g.,* 2 Okla. Stat. § 10-9.1(B)(13) (defining “Integrator” for purposes of Registered Poultry Feeding Operations Act); *but see, e.g.,* Ark. Code Ann. 15-20-903(9) (defining “poultry processor” under the Arkansas Poultry Feeding Operations Registration Act).

independent contractors (“Growers” or “Contract Growers”),⁵ who contract to raise poultry in their own houses or barns using their own equipment and labor,⁶ according to their own decision-making, and subject to varied contracts between different Growers and poultry companies.⁷

7. Disputed. This fact (i) is vague and argumentative; (ii) contains a legal conclusion; and (iii) is supported only by the inadmissible opinion of Plaintiffs’ expert.⁸ “[V]ertical integration” varies based on the speaker and thus is imprecise, *compare* Mot. ¶7, with Ex. 2 at 9; *see also National Broilers Mkt’g Ass’n v. United States*, 436 U.S. 816, 822 (1978) (defining integration as being “involved in more than one of the[] stages of production.”). Plaintiffs’ definition of “vertical integration” is immaterial to this case.

8. Disputed, in part. Tyson incorporates its responses to Disputed Facts ¶¶6 and 7. Tyson admits that Defendants are “integrators” within the meaning of 2 Okla. Stat. § 10-9.1(B)(13); *but see* Ark. Code Ann. 15-20-903(9) (referring to Defendants as “poultry processors” for purposes of the Arkansas Poultry Feeding Operations Registration Act).

9. Disputed. This fact and all of its sub-parts (i) is vague and overbroad, in part because it mixes together the current and historical operations of different companies and also because it repeatedly uses the phrase “a large number”; (ii) conflates two distinct categories of “poultry feeding operations”—those owned and operated by Contract Growers and those owned and operated by some Defendants; (iii) is ambiguous as to the relevant time period; and (iv) provides

⁵ *See* Butler Dep. at 118:23-119:2 (Dkt. No. 2033 Ex. 29); P.I.T. at 1336:12-1339:3, 1374:23-1375:14, 2025:9-15, 2030:7-2032:19, 2035:2-7, 2040:10-24, 2049:8-10 (Dkt. No. 2033 Ex. 5); Dkt. No. 2033 Exs. 30-35.

⁶ *See* Dkt. No. 2055 at ¶¶14-15; Reed I Dep. at 24:10-17; 25:12-16 (Ex. 3); Reed II Dep. at 53:17-24, 123:1-12 (Ex. 4); Bill Anderson Dep. at 207:9-11 (Ex. 5); Betty Anderson Dep. at 6:20-25 (Ex. 6); Butler Dep. at 45:6-12, 84:9-17, 156:5-10, 238:4-22 (Ex. 7); Pls. Ex. 38.

⁷ *See* Dicks Dep. at 115:20 (Pls. Ex. 11); PIT at 962; McClure Dep. at 133:2-4 (Pls. Ex. 8); Murphy Dep. at 230:3-5 (Pls. Ex. 26); McGarrah Dep. at 77:7-10 (Ex. 8); Schwabe Dep. at 18:21-23 (Ex. 9); *compare* Dkt. No. 2033 Exs. 30-35.

⁸ *See supra* at 1 n.3.

no evidence prior to 2000 to support its statements. Moreover, as detailed below, not all Defendants currently own or operate poultry feeding operations in the IRW, contract with Growers in the IRW, or did so in the recent past. *See infra* at ¶¶9(a)-(1).

a. Plaintiffs conflate who operated farms or contracted with farmers in the IRW at different times over many years. Tyson Foods, Inc., Tyson Poultry, Inc. and Tyson Chicken, Inc. do not currently own or operate any poultry raising operations in the IRW. *See* Pls. Ex. 14 at 36-38; Hudson Dep. at 60:15-61:10 (Ex. 10). Tyson Foods, Inc. and Tyson Chicken, Inc. have not contracted with Growers in the IRW since, at least, prior to 2001. *See* Pls. Ex. 15 at No. 1.

b. This allegation conflates the differing operations of various companies. For example, Tyson Foods, Inc. does not own any birds. *See* Hudson Dep. at 49:12-18 (Ex. 10). Moreover, the cited evidence expressly states that these “figures are estimates only [and] [t]he reliability and error rate in these estimates is unknown.” Pls. Ex. 15-18 at No. 1.

c. Cal-Maine Farms, Inc. does not have, and has never had, any production of any nature in the IRW. *See* Ex. 11 at Nos. 1-13; Ex. 12 at I.(a). Also, Cal-Maine Foods, Inc. ceased all production in the IRW in January, 2005. *See id.*

d. Cal-Maine Foods, Inc. shut its operation down completely in January 2005, and thus, only had birds for a part of one month in 2005. *See id.*

e. Cargill Inc. has had no poultry operations since June 1, 2004. *See* Dkt. No. 2079 Ex. F. CTP LLC does not “raise their birds themselves”: Contract Growers raise CTP LLC’s birds in the IRW, whether raising preproduction layers or poult in growout houses. *See* Alsup Dep. at 67:20-69:4, 126:12:15 (Dkt. No. 2079 Ex. B.2).

g. George’s, Inc. and George’s Farms, Inc. do not jointly, or both, own birds raised within the IRW, do not jointly, or both, contract with growers to raise birds in the IRW, and do

not jointly, or both, raise birds within the IRW. *See* McClure Dep. at 18:8-10, 34:9-10 (Ex. 13).

h. This allegation conflates the differing operations of two companies. For example, George's, Inc. and George's Farms, Inc. do not jointly, or both, own birds raised within the IRW. *See* McClure Dep. at 18:8-10 (Ex. 13). Moreover, the evidence cited expressly disclaims that "George's has no way to determine an error rate or percentage of accuracy, and such accuracy is limited by the accuracy of the reports from which this data came, the accuracy of the search process and the accuracy of the formulas used...to make the calculations." Pls. Ex. 23 at 4.

i. Peterson Farms has never owned or operated poultry growing operations in the IRW. *See* Wear Dep. at 18:6-19:6 (Ex. 14). Tyson otherwise admits that Peterson had contracts with independent poultry growers in the IRW up until June 2008, and that said independent growers owned and operated poultry feeding operations in the IRW.

j. The poultry production numbers listed for Peterson were revised and supplemented at least two times after Plaintiffs' Exhibit 24 was compiled. For both those numbers in Plaintiffs' Exhibit 24 and the subsequent supplements, Peterson qualified and objected to any use of the numbers by Plaintiffs for purposes such as use in their instant Motion. *See* Ex. 15.

k. Simmons does not own or operate poultry growing operations in the IRW. *See* Murphy Dep. at 169:5-9 (Ex. 16). Tyson otherwise admits that Simmons has contracts with independent poultry growers in the IRW and that said independent growers own and operate poultry feeding operations in the IRW.

l. Admitted except the numbers relate only to broilers and the reference to "large number" is "disputed" as being argumentative.

10. Disputed. This fact (i) is vague, overbroad and argumentative, particularly with respect to the terms "control" and "all essential aspects"; (ii) is ambiguous as to the relevant time

period; (iii) contains a legal conclusion; (iv) cites only the inadmissible opinion of Plaintiffs' expert;⁹ and (v) is unsupported by the evidence cited. Defendants do not control "all essential aspects of poultry production."¹⁰ Contract Growers are independent farmers and ranchers who contract with Defendants to raise poultry.¹¹ Contract Growers own, build and supply the houses or barns in which poultry are raised, and all equipment used during the raising process.¹² Growers typically purchase the bedding material—usually consisting of rice hulls or wood shavings—to place inside poultry houses to provide a soft and absorbent material on which to raise poultry.¹³ Growers, not Defendants, decide when to clean out poultry litter from their poultry houses or barns.¹⁴ Growers differ as to how best to raise the poultry entrusted to their care,¹⁵ and often compete with each other based on their ability to produce better poultry at a lower cost.¹⁶ Moreover, Growers, not Defendants, own the poultry litter generated on their farms.¹⁷ Growers, not Defendants, decide whether, when, and how to use that litter as a fertilizer on their farm, subject to the nutrient management plans and regulations issued by the State.¹⁸ If

⁹ See *supra* at 1 n.3.

¹⁰ See Ex. 2 at 16-23; McGarrah Dep. at 77:7-10 (Ex. 8); Schwabe Dep. at 18:21-23 (Ex. 9).

¹¹ Dkt. No. 2055 at ¶14.

¹² See *supra* at ¶6.

¹³ Dkt. No. 2055 at ¶16.

¹⁴ See Dkt. No. 2055 at ¶18; Reed I Dep. at 24:10-17; 25:12-16 (Ex. 3); Reed Dep. at 53:17-24, 123:1-12 (Ex. 4); Bill Anderson Dep. at 203:12-24, 207:9-11 (Ex. 5); Betty Anderson Dep. at 6:20-25 (Ex. 6); McGarrah Dep. at 36:18-22, 145:10-12, 149:13-25, 166:22-167:6 (Ex. 8); Schwabe Dep. at 71:23-72:25 (Ex. 9); Butler Dep. at 157:7-14 (Ex. 7).

¹⁵ See, e.g., Pigeon Dep. at 106:9-11 (Ex. 18); McGarrah Dep. at 77:7-10 (Ex. 8); Schwabe Dep. at 18:21-23 (Ex. 9); Dicks Dep. at 115:20 (Pls. Ex. 11); PIT at 962; McClure Dep. at 133:2-4 (Pls. Ex. 8); Murphy Dep. at 230:3-5 (Pls. Ex. 26); Dkt. No. 2033 Ex. 33 at SIM AG 37098-37099 ¶e; Dkt. No. 2033 Ex. 34 at CM-001338 ¶3.

¹⁶ Allen Dep. at 156:20-21, 179:9-22 (Ex. 17); Butler Dep. at 46:7-14, 69:1-19 (Ex. 7).

¹⁷ Dkt. No. 2033 at ¶14; Reed II Dep. at 29:2-25 (Ex. 4); McGarrah Dep. at 58:8-10 (Ex. 8)

¹⁸ Dkt. No. 2033 at ¶15; Pigeon Dep. at 165: 14-16 (Ex. 18); Bill Anderson Dep. at 135:15-20 (Ex. 5); Butler Dep. at 146:15-18 (Ex. 7); McGarrah Dep. at 99:23-101:1 (Ex. 8); Schwabe Dep. at 93:19-25 (Ex. 9); Reed II Dep. at 103:19-23 (Ex. 4); Taylor Dep. at 92:14-93:18 (Ex. 19); see also Dkt. No. 2033 Exs. 10-17.

a Grower sells or distributes poultry litter, the Grower, not Defendants, decides how much litter to sell, when and how to sell it, and the identity of the purchaser.¹⁹ The Grower receives and retains the proceeds from the sale or distribution of the Grower's litter.²⁰

Furthermore, Tyson disputes this fact and its sub-parts because not all Defendants currently own or operate poultry feeding operations and/or have contract poultry feeding operations in the IRW, or have in the past owned or operated poultry feeding operations and/or had contract poultry feeding operations in the IRW, *see, e.g., supra* at ¶¶9(a)-(l). Further, this fact and its sub-parts conflate the operations of all of the Defendants. Defendants are competitors whose operations vary.²¹ In addition to these generally applicable disputes, Tyson notes the following additional disputes on these respective sub-parts:

d. Birds may be delivered for processing based on (i) the terms of the Grower's particular contract;²² and (ii) the schedule, needs and wishes of the Grower.²³

e. The number of birds delivered may be based upon the terms of the contract entered into between a Defendant and a Contract Grower.²⁴

f. The Growers own, build and supply the houses or barns in which poultry are raised, and all equipment used during the raising process,²⁵ and (ii) the Growers freely enter into contracts with Defendants, including any contract in which the Grower agrees to provide houses,

¹⁹ See Dkt. No. 2033 at ¶17. Butler Dep. at 78:16-24, 108:19-25, 115:1-5 (Ex. 7); Allen Dep. at 114:10-24, 125:6-11, 191:19-21 (Ex. 17); Ex. 2 at 57-58.

²⁰ See Dkt. No. 2033 at ¶18.

²¹ Allen Dep. at 156:20-21, 179:9-22 (Ex. 17); Butler Dep. at 46:7-14, 69:1-19 (Ex. 7); Pigeon Dep. at 15:9-16:5, 17:18-18:1 (Ex. 18).

²² See, e.g., Alsup Dep. at 20:22-22:1 (Ex. 20).

²³ See McClure Dep. at 134:13-22 (Pls. Ex. 8); Murphy Dep. at 141:4-16 (Pls. Ex. 26); Reed II Dep. at 48:6-12 (Ex. 4); *see also* Reed II Dep. at 35:23-36:5 (Ex. 4).

²⁴ See Alsup Dep. at 261:18-24 (Pls. Ex. 33); *see, e.g.,* Dkt. No. 2033 Ex. 31 at GE41394 ¶1(A) (specifying delivery of 64,000 broiler chicks).

²⁵ See *supra* at ¶10 n.12.

barns and equipment that meet certain minimum standards.²⁶

g. Tyson's employees (also known as "service techs") do not "supervise the growing operations." Instead, service techs visit Growers' operations pursuant to the terms of their specific contracts. *See, e.g.*, Dkt. No. 2033 Ex. 30 at TSN22977S0K ¶1(E). During these visits, service techs perform activities in accordance with the terms of the specific contracts, including: (i) inspecting the poultry growing operations to ensure compliance with the terms of the contract by both Growers and Defendants;²⁷ and (ii) providing field support and advice to the Contract Growers upon request or pursuant to the terms of the contract.²⁸

h. Growers' poultry growing operations are located on property owned by the Growers,²⁹ and Defendants do not dictate each Grower's decision to operate a poultry growing operation at any specific location³⁰ or enter into a contract with any particular Defendant.³¹

i. Generally Growers, not Defendants, decide when to clean out poultry litter.³²

11. Disputed. This fact is vague, overbroad and argumentative, particularly as to what varying contracts say "generally" and whether that "underscores" alleged "control." Further, (i)

²⁶ *See* Dicks Dep. at 115:20 (Pls. Ex. 11); PIT at 962; McClure Dep. at 133:2-4 (Pls. Ex. 8); Murphy Dep. at 160:15-23; 230:3-5 (Pls. Ex. 26); Alsup Dep. at 56:14-19, 57:18-22 (Pls. Ex. 34); Butler Dep. at 44:6-18 (Pls. Ex. 29); Pilkington Dep. at 22:6-13 (Pls. Ex. 12); *see, e.g.*, Dkt. No. 2033 Ex. 30 at TSN59501S0K ¶2.

²⁷ *See, e.g.*, Dkt. No. 2033 Ex. 30 at TSN59503S0K ("Right of Access"); Pigeon Dep. at 65:12-66:22 (Ex. 18).

²⁸ *See* Reed II Dep. at 51:11-24, 60:20-61:6 (Ex. 4); Alsup Dep. at 36:25-37:3 (Ex. 20); Pigeon Dep. at 177:7-23 (Ex. 18); Dicks Dep. at 116:22-24 (Ex. 21); McClure Dep. at 138:10-13 (Ex. 13); Pilkington Dep. at 50:15-25 (Ex. 22); McGarrah Dep. at 147:14-18, 148:2-6, 151:6-9 (Ex. 8); *see, e.g.*, Dkt. No. 2033 Ex. 30 at TSN22977S0K ¶1(E); *see also* McGarrah Dep. at 77:7-10 (Ex. 8); Schwabe Dep. at 18:21-23 (Ex. 9).

²⁹ *See supra* at ¶10 n.12.

³⁰ McGarrah Dep. at 54:6-22, 56:7-10 (Ex. 8); Reed II Dep. at 15:13-18, 17:14-19 (Ex. 4); Butler Dep. at 45:6-12, 89:10-13 (Ex. 7); McClure Dep. at 174:10-25 (Ex. 13).

³¹ *See* Allen Dep. at 156:20-21, 179:9-22 (Ex. 17); Butler Dep. at 46:7-14, 69:1-19 (Ex. 7); *see also* Dicks Dep. at 115:20 (Pls. Ex. 11); P.I.T. at 962 (Ex. 1); McClure Dep. at 133:2-4 (Pls. Ex. 8); Murphy Dep. at 230:3-5 (Pls. Ex. 26).

³² *See supra* at ¶10 n.14.

the only evidence cited is Plaintiffs' expert's inadmissible opinion;³³ (ii) the evidence cited does not support the fact as written; (iii) not all Defendants currently or previously contracted with Growers in the IRW, *see, e.g., supra* at ¶¶9(a)-(l); and (iv) this alleged fact conflates Defendants' varied operations³⁴ and contracts³⁵. Moreover, the contracts are not "generally flock to flock," but rather long-term multi-year agreements.³⁶

12. Disputed. (i) The phrase "generally non-negotiable" is vague, overbroad and argumentative; (ii) this fact contains improper legal argument and conclusion; (iii) the evidence cited includes Plaintiffs' expert's inadmissible opinion;³⁷ (iv) the evidence cited does not support the fact as written; and (v) not all Defendants currently or previously contracted with Growers in the IRW, *see, e.g., supra* at ¶¶9(a)-(l). Further, in some instances various Defendants and Growers have negotiated various points in their contracts.³⁸ Moreover, Growers enter into contracts with Defendants entirely at their own discretion.³⁹

13. Disputed. (i) This fact is vague, overbroad and argumentative; (ii) the determination whether a market actor exercises oligopsony power is a legal conclusion; (iii) the only evidence cited is Plaintiffs' expert's inadmissible and unsupported opinion;⁴⁰ (iv) the evidence cited is insufficient to support the legal conclusion asserted in this paragraph; (v) not all Defendants

³³ *See supra* at 1 n.3.

³⁴ *See supra* at ¶10 n.21.

³⁵ *Compare* Dkt. No. 2055 Exs. 30-35.

³⁶ *See* Ex. 2 at 18-19; Taylor Dep. at 106:7-107:12 (Ex. 19) (admitting existence of long term 3-year and 7-year contracts); Ex. 23 at ¶29 (admitting existence of long term contracts); *see* P.I.T. at 971:23-972:12, 973:9-974:1 (Ex. 1)(same); *see, e.g.,* Dkt. No. 2033 Ex. 32 at PFIRWP-047127 ¶9 (7 year contract).

³⁷ *See supra* at 1 n.3.

³⁸ *See, e.g.,* Storm Dep. at 55 (Pls. Ex. 19); Pilkington Dep. at 21:22-22:21 (Pls. Ex. 12); Schwabe Dep. at 57:12-16 (Ex. 9); McGarrah Dep. at 197:1-5 (Ex. 8).

³⁹ Dicks Dep. at 115:20 (Pls. Ex. 11); PIT at 962; McClure Dep. at 133:2-4 (Pls. Ex. 8); Murphy Dep. at 230:3-5 (Pls. Ex. 26); McGarrah Dep. at 188:21-22 (Ex. 8).

⁴⁰ *See supra* at 1 n.3.

currently or previously contracted with Growers in the IRW, *see, e.g., supra* at ¶¶9(a)-(l); and (vi) this alleged fact conflates Defendants’ varied operations, *see supra* at ¶10 n.21. Moreover, empirical analysis demonstrates that Defendants do not have oligopsony power over the Growers. *See* Ex. 2 at 16-17.

14. Disputed. This fact (i) contains a legal argument and conclusion about the meaning of various contractual relationships and the legal owner of a valuable resource; (ii) is supported only by Plaintiffs’ expert’s inadmissible opinion;⁴¹ and (iii) it conflates Defendants’ varied operations, *see supra* at ¶10 n.21. Moreover, not all Defendants currently or previously contracted with Growers in the IRW, *see, e.g., supra* at ¶¶9(a)-(l); and Growers in the IRW own the poultry litter that results from the growing process—both at present and at all times in the past.⁴² Finally, Tyson disputes Plaintiffs’ characterization of the poultry litter that results from the growing process as “poultry waste” because poultry litter is not “waste,” but rather is a commercial product used as a beneficial fertilizer.⁴³

15. Disputed. This fact duplicates Facts 12 and 14. *See* responses to Facts 12 and 14. Otherwise, this fact contains only improper legal argument and conclusion.

16. Disputed. This fact (i) contains irrelevant, speculative, and inadmissible lay opinion; (ii) contains improper legal conclusion; and (iii) relies upon inadmissible hearsay.

17. Disputed. This fact (i) contains a legal argument and conclusion; (ii) addresses irrelevant proceedings in other cases; (iii) relies upon irrelevant, speculative, and inadmissible lay opinion; and (iv) is unsupported by the evidence cited. This fact duplicates allegations in

⁴¹ *See supra* at 1 n.3.

⁴² *See supra* at ¶10 n.17.

⁴³ *See infra* at ¶25; *see also* Reed II Dep. at 100:10-15 (Ex. 4); Butler Dep. at 126:2-4 (Ex. 7). For brevity, Tyson hereby incorporates this dispute for every fact in which Plaintiffs refer to poultry litter as “poultry waste.”

paragraphs 10-16. *See supra* at ¶¶10-16. Moreover, neither of the Cal-Maine defendants was a defendant in *City of Tulsa*, and therefore nothing about either Cal-Maine defendant was demonstrated. Moreover, the defendants in the *City of Tulsa* litigation did not control Growers' use of poultry litter; instead, Growers in the Eucha-Spavinaw Watershed agreed voluntarily to comply with the consent order entered in that case. *See* P.I.T. at 1355:8-1356:4 (Ex. 1). There is no evidence that Growers in the IRW would do the same in this case.

18. Disputed. This fact (i) is ambiguous as to the relevant time period; (ii) is not supported by the evidence cited; and (iii) conflates Defendants' varied operations, *see supra* at ¶10 n.21. Not all Defendants currently own or previously owned birds raised in the IRW, *see supra* at ¶¶9(a)-(1). Moreover, the evidence demonstrates that this estimate is based on a number of flawed assumptions and is incorrect.⁴⁴ Defendants contend that approximately 1,809 active poultry houses are in the IRW. *See* Ex. 24 at 9, App. B.

19. Disputed. This fact (i) is ambiguous as to the time period and type of bird to which it refers; and (ii) it conflates Defendants' varied operations, *see supra* at ¶10 n.21.

20. Disputed, in part. This fact (i) is vague, overbroad and argumentative, particularly with respect to the phrase "most concentrated ... in the entire country;" (iii) is ambiguous as to the relevant time period; (iii) is immaterial to the present litigation; and (iv) is not supported by the evidence cited both generally and because it regards only the Arkansas portion of the IRW.

21. Disputed. This fact (i) is vague and overbroad, particularly with respect to the phrase "dispersed geographically across the IRW;" (ii) is ambiguous as to the relevant time period; (iii) is unsupported by the evidence cited; (iv) conflates "poultry feeding operations" operated by Growers and those operated by a Defendant; and (v) conflates Defendants' varied operations.

⁴⁴ *See, e.g.*, Fisher II Dep. at 144:15-145:14 (admitting that some of these calculations were not tested) (Ex. 25); Fisher I Dep. at 270:21-271:3 (Ex. 26).

See supra at ¶10 n.21. Not all Defendants currently own or operate poultry feeding operations and/or have contract poultry feeding operations in the IRW, or have in the past owned or operated poultry feeding operations and/or had contract poultry feeding operations in the IRW, *see, e.g., supra* at ¶¶9(a)-(1). Moreover, the IRW encompasses thousands of separately-owned parcels of property dedicated to a wide array of uses other than poultry growing operations. Thus, many geographic locations in the IRW do not contain poultry houses.⁴⁵

22. Disputed. This fact (i) is vague, overbroad and argumentative; (ii) is ambiguous as to the relevant time period; (iii) contains an improper legal conclusion; and (iv) is unsupported by any evidence in violation of Fed. R. Civ. P. 56. Moreover, the evidence cited includes Plaintiffs' expert's inadmissible opinions;⁴⁶ and does not support the fact as written. Additionally, these estimates far exceed those provided by Dr. Dan Storm in his Report to ODEQ in 2003 and 2006 and Dr. Billy Clay. *See* Ex. 24 at 5, 16-17. Finally, this fact (i) conflates Defendants' varied operations, *see supra* at ¶10 n.21; and (ii) not all Defendants currently or previously owned birds raised in the IRW, *see supra* at ¶¶9(a)-(1).

23. Disputed. This fact (i) is vague and argumentative, particularly with respect to the phrase "equivalent to a human population"; and (ii) is ambiguous as to the relevant time period. The only evidence cited is Plaintiffs' expert's inadmissible affidavit;⁴⁷ and the evidence cited does not support the fact as written. Moreover, it conflates Defendants' varied operations. *See supra* at ¶10 n.21. Not all Defendants currently own birds raised in the IRW, *see supra* at ¶¶9(a)-(1), and this fact does not associate alleged phosphorus content with each Defendant.

24. Disputed. These estimates far exceed those provided by Dr. Dan Storm in his

⁴⁵ *See* Dkt. No. 1872 at 1 ¶2, 19-20 n.20; Ex. 1 at 25, 28-29 & Figure 3.1; Ex. 11 at 9.

⁴⁶ The testimony is the subject of *Defendants' Motion to Exclude the Testimony of Bernard Engel*, Dkt. No. 2056 (May 18, 2009).

⁴⁷ *See supra* at 11 n.46.

Report to ODEQ in 2003 and 2006 and Dr. Billy Clay. *See* Ex. 24 at 5, 16-17. This fact conflates Defendants' varied operations, *see supra* at ¶10 n.21.

25. Disputed. This fact contains an improper legal conclusion. Not all Defendants currently own birds raised in the IRW, *see supra* at ¶¶9(a)-(l), and thus this fact conflates Defendants' varied operations, *see supra* at ¶10 n.21. Moreover, poultry litter has a number of beneficial uses including as an inexpensive fertilizer for use in Growers' farming operations.⁴⁸ Growers may also sell or barter poultry litter, thereby increasing their profitability.⁴⁹

26. Disputed. Poultry litter does not contain elemental phosphorus.⁵⁰ Additionally, this fact is vague, overbroad and argumentative, particularly with respect to the phrase "significant amounts," and conflates Defendants' operations, *see supra* at ¶10 n.21. Not all Defendants currently own birds raised in the IRW, *see supra* at ¶¶9(a)-(l).

27. Disputed. This fact (i) is a legal argument and conclusion; and (ii) the evidence cited does not support the fact as written. Moreover, the *only* phosphorus compounds that constitute hazardous substances within the meaning of CERCLA are the specific phosphorus compounds listed in the CERCLA hazardous substances list. *See* 40 C.F.R. § 302.4 (listing 48 specific phosphorus compounds).⁵¹ The compound "orthophosphate" is not listed in the

⁴⁸ Dkt. No. 2055 Ex. 2 at 1, 2; Dkt. No. 2055 Ex. 3 at 1; Ex. 4; P.I.T. at 31:11-14, 540:19-541:4, 1764:23-1768:9 (Dkt. No. 2055 Ex. 5); Peach Dep. at 45:7-10, 126:22-128:9, 136:17-137:24 (Dkt. No. 2055 Ex. 6); Schwabe Dep. at 158:19-22 (Ex. 9); Butler Dep. at 125:20-25 (Ex. 7); Thralls Dep. at 19:11-17 (Ex. 27); Dkt. No. 2055 Ex. 7 at 7-8; Ex. 28 at ¶¶3(a)-(i), 4(a)-(b); *see also infra* at ¶36.

⁴⁹ *See* Butler Dep. at 243:3-17 (Dkt. No. 2055 Ex. 34); Fisher I Dep. at 317:13-20 (Dkt. No. 2055 Ex. 24); P.I.T. at 2052:21-2053:14 (Dkt. No. 2055 Ex. 5); Dkt. No. 2055 Ex. 42 at Hunton Aff. ¶4, Pigeon Aff. ¶6, Reed Aff. ¶11; Schwabe Dep. at 109:3-6 (Ex. 9); Reed II Dep. at 28:9-15, 30:16-19 (Ex. 4); Pigeon Dep. at 47:3-48:23 (Ex. 18); *see also* Dkt. No. 2055 Ex. 8; Berry Dep. at 253:8-11 (Ex. 29); Ex. 2 at 57-58.

⁵⁰ *See* Dkt. No. 1872 at 1 ¶¶2, 8 & Ex. 8 at No. 10; Dkt. No. 1872 Ex. 9 at 1; Dkt. No. 1925 at 1-5, Ex. A ¶¶10-13; Ex. 28 at ¶¶3(j)-(k).

⁵¹ *See also* Dkt. No. 1872 at 8-12 (Feb. 18, 2009); Dkt. No. 1925 at 1-5 (Mar. 23, 2009); Dkt.

CERCLA hazardous substances list. *See* 40 C.F.R. § 302.4. EPA has specifically clarified that Plaintiffs are wrong that all phosphorus compounds are CERCLA hazardous substances.⁵²

28. Disputed. This fact is ambiguous as to the relevant time period and to what parties it addresses (both non-party Growers and other non-party farmers apply litter). Further, not all of the poultry litter generated in the IRW is applied to lands in the IRW, as there is a robust market for poultry litter that exports litter outside of the IRW.⁵³ Tyson also disputes this fact because (i) the evidence cited includes the inadmissible opinions of an undisclosed expert witness;⁵⁴ (ii) the evidence cited does not support the fact as written; and (ii) it conflates Defendants' varied operations, *see supra* at ¶10 n.21. Moreover, the statement of defense counsel cited in this paragraph does not constitute evidence, *see, e.g., Dobbs v. Zant*, 506 U.S. 357, 362 (1993); *Thornburg v. Mullin*, 422 F.3d 1113, 1134 (10th Cir. 2005), and in any event this statement referred only to the fact that Oklahoma approves litter-management plans that authorize the application of litter at rates that exceed the amounts that Plaintiffs claim are excessive.⁵⁵

Tyson otherwise admits that, at some unidentified point in time, it became aware that Growers and other farmers use poultry litter, at their own discretion, by selling or distributing the product, storing it, or using the product as a fertilizer and soil amendment.⁵⁶ Tyson was aware that poultry litter is applied to the land in part because the State of Arkansas and the State of

No. 2184 at 2-3 (June 5, 2009) (Opp. to CERCLA claims).

⁵² *See* Dkt. No. 1872 at 11-12 & Ex. 23 at 2; Dkt. No. 1872; Dkt. No. 1925 at 5.

⁵³ *See* Dkt. No. 2055 Ex. 8; Ex. 24 at 5; *see, e.g., Butler Dep.* at 108:19-25, 115:1-5 (Ex. 7); *Young Dep.* at 210:8-24 (Ex. 30); Ex. 2 at 57-58.

⁵⁴ The testimony of Indrajeet Chaubey is inadmissible because the opinions were not disclosed pursuant to Fed. R. Civ. P. 26(a), *see* Ex. 31, and he is not testifying about pre-litigation work he performed in the IRW, and thus cannot qualify as an unretained expert. *See Chaubey Dep.* at 7:16-17, 8:6-14, 9:10-18:13, Ex. 1 (Ex. 32); *Watson v. U.S.*, 485 F.3d 1100, 1107 (10th Cir. 2007); *B.H. v. Gold Fields Mining Corp.*, 2007 WL 128224 at *3-4 (N.D. Okla. Jan. 11, 2007).

⁵⁵ *See* P.I.T. at 32:25-33:12 (Ex. 1); *see also* Mot. at 18 ¶37; Dkt. 1917 at 8; Dkt. No. 2055 Ex. 43 at No. 9; Dkt. No. 2055 Ex. 30 at No. 7; Dkt. No. 2055 Ex. 44 at 2 Nos. 2-3.

⁵⁶ *See supra* at ¶10 nn.18-19.

Oklahoma authorize⁵⁷ and encourage⁵⁸ the use of poultry litter as a fertilizer in the IRW.

29. Disputed. This fact contains improper legal argument and conclusion. Also, the evidence cited does not support the fact as written. Both Oklahoma and Arkansas expressly authorize the land application of poultry litter as a fertilizer in the IRW pursuant to nutrient management plans (NMP) *and/or* animal waste management plans (AWMP) drafted, issued and approved by State agents.⁵⁹ These litter management plans are not merely “guidance document[s].” Mot. at ¶29. Rather, these state-drafted, issued and approved litter management plans are specifically tailored to each parcel of land upon which poultry litter is to be applied, and expressly dictate the time, method, location and amount of litter that may be applied in conformance with the laws and regulations of Oklahoma and Arkansas.⁶⁰ Neither the plans nor state law caution that compliance with these specific instructions may still result in a violation of the law. *See* Dkt. No. 2055 Exs. 10-17. To the contrary, Oklahoma AWMPs each state that “[t]he law requires that the Natural Resources Conservation Service (NRCS) recommendations for litter application rates *be followed*.” Dkt. No. 2055 Exs. 10-14 at 2 (emphasis added); *see*

⁵⁷ *See infra* at ¶29

⁵⁸ *See, e.g.*, 2 O.S. § 10-9.1, *et seq.*; O.A.C. § 35:17-5-1; Dkt. No. 2055 Ex. 8; Dkt. No. 2055 Ex. 9; Peach Dep. at 79:3-9 (Ex. Dkt. No. 2055 6); Ark. Code Ann. § 15-20-902; Ark. Code Ann. § 15-20-1102; *see also infra* at ¶36.

⁵⁹ *See* 2 O.S. §§ 10-9.7, 20-48; 2 O.S. § 10-9-16, *et seq.*; O.A.C. § 35:17-5-1, *et seq.*; O.A.C. § 35:17-7-1, *et seq.*; Ark. Code Ann. § 15-20-1108(b)(1); Ark. Code Ann. § 15-20-1101, *et seq.*; ANRC Reg. 2201.1, *et seq.*; ANRC Reg. 2101.1, *et seq.*; *see, e.g.*, Dkt. No. 2055 Exs. 10-17; *see also, e.g.*, Young Dep. at 223:12-17 (Dkt. No. 2055 Ex. 18); Parrish Dep. at 71:4-79:20, 235:21-236:3 (Dkt. No. 2055 Ex. 19); Gunter Dep. at 74:6-12 (Dkt. No. 2055 Ex. 20); Fisher II Dep. at 470:8-471:8, 472:15-473:7, 495:15-21 (Ex. 25); Littlefield Dep. at 108:13-19 (Ex. 33).

⁶⁰ *See* 2 O.S. §§ 10-9.7, 20-48; 2 O.S. § 10-9-16, *et seq.*; O.A.C. § 35:17-5-1, *et seq.*; O.A.C. § 35:17-7-1, *et seq.*; Ark. Code Ann. § 15-20-1108(b)(1); Ark. Code Ann. § 15-20-1101, *et seq.*; ANRC Reg. 2201.1, *et seq.*; ANRC Reg. 2101.1, *et seq.*; Natural Resources Conservation Service (NRCS) Code 590 at 5-6, 28-32 (Ex. 34); *see, e.g.*, Dkt. No. 2055 Exs. 10-17; *see also* Young Dep. at 223:12-17 (Dkt. No. 2055 Ex. 18); Parrish Dep. at 71:4-79:20, 235:21-236:3 (Dkt. No. 2055 Ex. 19); Gunter Dep. at 74:6-12 (Dkt. No. 2055 Ex. 20); Fisher II Dep. at 470:8-471:8, 472:15-473:7 (Dkt. No. 2055 Ex. 21).

Abernathy Dep. at 54:4-14 (Ex. 35). Similarly, Arkansas NMPs state that “[t]he contents of this document are *legally binding and must be implemented* through farm practices and procedures.” Dkt. No. 2055 Ex. 17 at 8 (emphasis added). Further, both the authors of the plans and the state officials responsible for their enforcement have testified that “if a poultry applicator follows the animal waste management plan related to the application site, than that person is complying with Oklahoma law.”⁶¹ Throughout this litigation, State agents have continued to approve and issue new plans for application of litter within the IRW. *See, e.g.*, Dkt. No. 2055 Exs. 10-12, 17.

30. Disputed. This fact (i) is vague and overbroad, including as to relevant time period and the terms “vast majority” and “close proximity”; (ii) is supported by the inadmissible opinions of an undisclosed expert witness;⁶² and (iii) conflates Defendants’ varied operations, *see supra* at ¶¶9(a)-(l). Moreover, Dr. Fisher admitted that Plaintiffs cannot account for where most of poultry litter is actually applied. *See* Pls. Ex. 45 at 192:22-193:11. The “vast majority of poultry litter” is not applied in close proximity to where it is created.⁶³

31. Disputed. Defendants dispute this fact because (i) it is vague and overbroad; (ii) is ambiguous as to the relevant time period or locations; and (iii) the evidence cited includes the inadmissible opinions of Plaintiffs’ experts.⁶⁴ Moreover, Plaintiffs’ experts admittedly did not determine whether any specific periods of rainfall (of more than two inches) occurred within 24 hours after any particular litter application dates during this period. *See* Fisher II Dep. at 633:7-

⁶¹ Littlefield Dep. at 108:13-19 (Ex. 33); *see, e.g., id.* at 97:5-106:3; Abernathy Dep. at 11:13-14, 26:14-25, 42:1-43:6 (Ex. 35); *see* Ex. 36 at 104-106; Fisher II Dep. at 470:8-471:8 (Dkt. No. 2055 Ex. 21); *see also* Smolen Dep. at 80:14-81:3 (Ex. 37); Abernathy Dep. at 36:14-25, 93:1-24 (Ex. 35).

⁶² The testimony of Indrajeet Chaubey is inadmissible. *See supra* at ¶28 n.54.

⁶³ Ex. 24 at 5; Fisher II Dep. at 159:2-160:18 (Ex. 25); *see, e.g.*, Butler Dep. at 108:19-25, 115:1-5 (Ex. 7); Young Dep. at 210:8-24 (Ex. 30); Ex. 2 at 57-58.

⁶⁴ The testimony is the subject of *Defendants’ Motion to Exclude the Testimony of Bernard Engel*, Dkt. No. 2056 (May 18, 2009), and *Defendants’ Motion to Exclude the Testimony of Christopher Teaf*, Dkt. No. 2067 (May 18, 2009).

11 (Ex. 25); *id.* at 633:20-24.

32. Disputed. This fact (i) is vague and overbroad, particularly with respect to the phrase “significant amounts;” and (ii) is ambiguous as to the relevant time period or locations. Not all Defendants currently own birds raised in poultry growing operations located within the IRW, *see supra* at ¶¶9(a)-(l); and none of the evidence cited supports the statement as it pertains to “each Defendant.” Tyson also disputes this fact because, as Plaintiffs’ Exhibit 45 indicates, Dr. Fisher’s testimony only purports to cover the years 1999-2004. *See* Pls. Ex. 45 at 186:18-187:1. Additionally, Dr. Fisher admits that (i) the records on which he bases his calculations are incomplete and inaccurate, *see id.* at 187:5-187:6; 188:9-188:21; 192:15-192:21, and (ii) he cannot account for where most of poultry litter is actually applied, even during the 1999-2004 time frame, *see id.* at 192:22-193:11. Furthermore, the record evidence demonstrates that “[a]t least 70,000 tons of poultry litter is currently exported annually from the IRW.”⁶⁵

33. Disputed. This fact is (i) is vague and overbroad; (ii) ambiguous as to the relevant time period and locations; and (iii) it conflates Defendants’ varied operations, *see supra* at ¶10 n.21. Moreover, Plaintiffs’ Exhibit 71 is based on the same admittedly incomplete and inaccurate data referenced in Fact 32. *See supra* at ¶32. Furthermore, this fact ignores that significant amounts of poultry litter are land applied outside of the IRW.⁶⁶

34. Disputed. This fact is based on the preceding paragraphs. *See supra* at ¶¶10, 18-21. Tyson additionally disputes this fact because (i) it is vague, overbroad and argumentative, particularly with respect to the phrase “strongly influence”; (ii) the previously referenced evidence does not support the fact as written; (iii) the only evidence cited is the inadmissible

⁶⁵ Ex. 24 at 5; *see* Butler Dep. at 108:19-25, 115:1-5 (Ex. 7); Young Dep. at 210:8-24 (Ex. 30).

⁶⁶ *See supra* at ¶31 n.64.

opinion of Plaintiffs' expert;⁶⁷ and (iv) not all Defendants currently own or operate poultry feeding operations and/or have contract poultry feeding operations in the IRW, or have in the past owned or operated poultry feeding operations and/or had contract poultry feeding operations in the IRW, *see, e.g., supra* at ¶¶9(a)-(l).

35. Disputed. None of the evidence cited supports the statement that where poultry litter "is not incorporated into the soil by tilling ... it may be more readily transported." Moreover, Plaintiffs' expert explicitly disclaimed any opinion about poultry litter transport from untilled soil. *See* Pls. Ex. 45 at 157:5-157:12. Furthermore, tilling litter into soil would have little or no effect on whether "it may be more readily transported" in any area that is not "hydrologically active" (*i.e.* does not generate overland flow). *See* Ex. 36 at 74; *see also id.* at 76, 78.

36. Disputed. Litter is a widely utilized fertilizer, which provides soil nutrients, increases crop yields and outperforms commercial fertilizers.⁶⁸ Further, both Oklahoma and Arkansas recognize poultry litter as an effective fertilizer, and encourage and approve its use.⁶⁹

37. Disputed. This fact is vague and argumentative, particularly with respect to the terms "virtually no agronomic benefit;" and the evidence cited does not support the fact as written. Moreover, application of poultry litter to soils measuring above 65 STP can benefit crops by supplying necessary nitrogen and other nutrients, without causing negative environmental impact.⁷⁰ No authority has accepted the proposition that at levels above 65 STP

⁶⁷ *See supra* at 1 n.3.

⁶⁸ *See* Dkt. No. 2055 at 3; Littlefield Dep. at 120:21-121:8 (Ex. 33); Parrish Dep. at 226:22-227:5 (Ex. 38); Smolen Dep. at 94:21-95:1 (Ex. 37); Fite Dep. at 120:8-9 (Ex. 39); Pls. Ex. 54 at 27:17-27:23; Ex. 28 at ¶¶3(a)-(i), 4(a)-(b).

⁶⁹ *See* Dkt. No. 2055 at 4-5; *see also supra* at ¶36 n.68.

⁷⁰ *See* Ex. 28 at ¶¶3(a)-(i), 4(a)-(b); Pls. Ex. 75 ¶5(a); Smolen Dep. at 87:19-88:4 (Ex. 37); *see also, e.g.,* McGarrah Dep. at 176:3-15 (Ex. 8).

there is virtually no agronomic benefit gained from applying additional phosphorus.⁷¹

38. Disputed. This fact (i) is vague and argumentative; (ii) contains a legal conclusion; and (iii) the evidence cited includes the inadmissible opinions of an undisclosed expert witness.⁷² Moreover, application of poultry litter to soils measuring above 65 STP can benefit crops by supplying necessary nitrogen and other nutrients, without causing negative environmental impact.⁷³ Land application of poultry litter to fields testing above STP 120 is explicitly authorized by Oklahoma and Arkansas law.⁷⁴

39. Disputed. This fact (i) is vague, overbroad and argumentative; (ii) is ambiguous as to the relevant time period; (iii) contains an improper legal conclusion; and (iv) the evidence cited includes the inadmissible opinions of an undisclosed expert⁷⁵ and the inadmissible statement of counsel.⁷⁶ Moreover, litter is applied in the IRW consistent with state laws,⁷⁷ which

⁷¹ See Natural Resources Conservation Service (NRCS) Code 590 at 5-6, 28-32 (Ex. 34); Okla. Admin. Code § 35:17-5-3(b); Ark. Code Ann. § 15-20-1108; P.I.T. at 577:13-580:10 (Ex. 1); Johnson Dep. at 62:11-64:25, 85:13-21 (Dkt. No. 1872 Ex. 34); Ex. 28 at ¶5(a).

⁷² See *supra* at ¶28 n.54.

⁷³ See Ex. 28 at ¶¶3(a)-(i), 4(a)-(b); Pls. Ex. 75 ¶5(a); Smolen Dep. at 87:19-88:4 (Ex. 37); *see also, e.g.*, McGarrah Dep. at 176:3-15 (Ex. 8).

⁷⁴ See Natural Resources Conservation Service (NRCS) Code 590 at 5-6, 28-32 (Ex. 34); Okla. Admin. Code § 35:17-5-3(b); Ark. Code Ann. § 15-20-1108; Abernathy Dep. at 51:19-52:19 (Ex. 35); Ex. 28 at ¶5(a).

⁷⁵ See *supra* at ¶28 n.54.

⁷⁶ See *supra* ¶28.

⁷⁷ Dkt. No. 2055 at ¶8; *see also, e.g.*, Fisher II Dep. at 560:5-21 (Ex. 25); Gunter Dep. at 57:13-61:2, 63:4-12 (Ex. 40); Parrish Dep. at 259:19-25 (38); Traylor Dep. at 41:22-42:6 (Ex. 41); Fite Dep. at 120:1-4 (Ex. 39); Allen Dep. at 70:18-20 (Ex. 17); Berry Dep. at 237:11-15 (Ex. 29); Littlefield Dep. at 139:1-13, 141:12-142:5, 153:6-17, 176:24-177:9, 181:22-182:19, 183:25-184:25, 187:14-188:1 (Ex. 33); *see also, e.g.*, Dkt. No. 2055 Exs. 10-17. On this point, Plaintiffs have made no effort to disaggregate appropriate from inappropriate litter applications, nor identified evidence of any poultry litter applications made in violation of the litter laws and regulations of Arkansas or Oklahoma. In four years of investigation, Plaintiffs' field investigators failed to document any violations of state litter laws. See Dkt. No. 2055 at ¶9; Fisher I Dep. at 146:22-149:1 (Dkt. No. 2055 Ex. 24); *see, e.g.*, Steele Dep. at 146:5-7, 148:5-9, 187:1-4, 193:1-4, 193:16-20 (Ex. 42); Tuell Dep. at 88:21-23, 90:10-16, 140:25-142:4 (Ex. 43); Bracken Dep. at 65:12-18 (Ex. 44); Stansill Dep. at 65:14-19, 80:7-10 (Ex. 45); Nance Dep. at

authorize and regulate the land application of poultry litter.⁷⁸ *See supra* at ¶29.

40. Disputed. Growers own the poultry litter created on their farms. *See supra* at ¶14. No evidence supports the statement that poultry litter has been applied inconsistent with the “normal application of fertilizer,” “in significantly greater concentrations or amounts that are beneficial to crops” or inconsistent “with good agricultural practices.” Moreover, Plaintiffs cannot identify the absence of proof as evidence in support of a material fact for which Plaintiffs carry the burden of proof. *See Adler v. Wal-Mart Stores*, 144 F.3d 664, 670 (10th Cir. 1998). The evidence is that poultry litter is applied in the IRW consistent with Oklahoma and Arkansas laws, *see supra* at ¶39, in a manner constituting normal application of fertilizer and consistent with good agricultural practices, *see* Dkt. No. 1872 at 12-18; Dkt. No. 1925 at 7-8. Plaintiffs identify no evidence to the contrary. This fact (i) is ambiguous as to the relevant time period; and (ii) contains improper legal argument and conclusion. Moreover, not all Defendants currently own birds raised in poultry operations within the IRW, *see supra* at ¶¶9(a)-(l).

41. Disputed. This fact is duplicative of the prior facts and Tyson hereby incorporates its responses. *See supra* at ¶¶30-33, 35-39; *see also supra* at ¶¶28-29.

42. Disputed, in part. This fact (i) is vague; and (ii) unsupported by the evidence cited. The fact and the cited evidence inconsistently refer to the terms phosphorus “loadings” and phosphorus “concentrations,” which are separate calculations. For example, the highest concentrations of phosphorus are observed directly downstream from wastewater treatment facilities and urban land use, during both low and high flow conditions.⁷⁹ Second, the term

32:24-33:2, 78:2-79:1, 87:24-88:2 (Ex. 46); Jones Dep. at 31:1-4, 36:5 Ex. 47; Walton Dep. at 42:9-23, 43:23-44:21, 49:5-8, 50:4-6, 52:1-4, 60:13-21, 61:7-12, 81:19-23 (Ex. 48); Weatherly Dep. at 77:5-85:15 (Ex. 49).

⁷⁸ *See* Dkt. No. 2055 at ¶¶6-7; *supra* at ¶29.

⁷⁹ *See* Ex. 36 at 29-37, Figs. 5-5, 5-6; *see also, e.g.*, Fite 2009 Dep. at 43:20-21, 46:7-9, 75:9-11

“waters of the IRW” is also vague because it does not distinguish surface water from groundwater, which is not affected by high-flow events. Moreover, the cited evidence fails to quantify or consider the phosphorus contributions during high flow events that are derived from the resuspension of point source phosphorus previously deposited to the streambed or bottom of impoundments.⁸⁰ Tyson otherwise admits that phosphorus is contributed to stream water during high-flow events from point and non-point sources. *See* Ex. 36 at 29-50.

43. Disputed. This fact (i) is vague and overbroad; and (ii) unsupported by the evidence cited. This fact and the cited evidence inconsistently refer to phosphorus “loadings” and phosphorus “concentrations,” which are separate calculations. Moreover, the evidence fails to quantify or consider the phosphorus contributions during high flow events that are derived from the resuspension of point source phosphorus previously deposited to the streambed or bottom of impoundments.⁸¹ Further, the most important phosphorus loads impacting water quality in the IRW are “the phosphorus that comes in every day after day from wastewater treatment plants.”⁸²

44. Disputed. This fact (i) is vague, overbroad and argumentative; (ii) the evidence cited includes the inadmissible opinions of an undisclosed expert witness⁸³ and inadmissible hearsay.⁸⁴ Tyson also disputes this fact because (i) Ms. Smith’s mass balance calculations are flawed and cannot identify the sources of phosphorus in stream or lake water, *see* Ex. 38 at 95-98; (ii) Dr. Smolen’s inadmissible and unsupported testimony does not establish a purported

(Ex. 39).

⁸⁰ *See* Ex. 36 at 47-49 (analyzing resuspension of point source phosphorus in Lake Frances); Peach Dep. at 79:24-82:19 (Ex. 50); Craig Dep. at 94:14-96:22 (Ex. 51); Smith Dep. at 95:10-97:25 (Ex. 52).

⁸¹ *See supra* at ¶42 n.80.

⁸² Connolly Dep. at 107:5-107:12 (Pls. Ex. 90); *see* Ex. 53 § 2.9; Pls. Ex. 88 at 4.

⁸³ *See supra* at ¶28 n.54.

⁸⁴ The testimony of Dr. Smolen constitutes inadmissible hearsay, not subject to any exception. *See* Fed. R. Evid. 801; Smolen Dep. at 138:21-139:10 (Pls. Ex. 92).

consensus among water quality professionals; and (iii) Plaintiffs' experts admittedly have not tracked or provided any data to demonstrate the movement of phosphorus from the edge of a field where poultry litter has been applied to any stream in the IRW⁸⁵. Moreover, the most important phosphorus loads impacting IRW water quality are "the phosphorus that comes in every day after day from wastewater treatment plants."⁸⁶ Furthermore, Plaintiffs' analyses fail to consider numerous other sources of phosphorus in the watershed, including people, cattle, urban areas and soil erosion, among others. *See, e.g.*, Ex. 36 at 26-50.

45. Disputed. This fact (i) is vague, overbroad and argumentative; (ii) relies on inadmissible undisclosed expert opinion;⁸⁷ and (iii) is not supported by the evidence cited. None of the evidence cited supports the statement that cattle are not "major contributors" to the watershed. To the contrary, cattle contribute more water extractable phosphorus (WEP) than poultry sources.⁸⁸ Furthermore, cattle do not "simply recycl[e] pre-existing nutrients," but rather represent "a major NPS pollutant transport mechanism" and "an important source of NPS pollutants to streams."⁸⁹ For example, cattle serve to accelerate phosphorus transport to water by consuming phosphorus in one location (typically pasture land) and depositing phosphorus in another location (typically in a stream or adjacent riparian land). *See supra* at 21 n.89.

46. Disputed. This fact (i) is vague, overbroad and argumentative; and (ii) unsupported by the evidence cited. Plaintiffs' experts have not tracked or provided any data to demonstrate the movement of phosphorus from the edge of a field where poultry litter has been applied to any

⁸⁵ *See* Fisher II Dep. at 83:12-84:5 (Ex. 25); *see also* Ex. 36 at 115; Ex. 28 at ¶¶5(h), 9.

⁸⁶ Connolly Dep. at 107:5-107:12 (Pls. Ex. 90); *see* Ex. 53 § 2.9; Pls. Ex. 88 at 4; *see also* Ex. 54 at 6-7, Table 4.

⁸⁷ *See supra* at ¶28 n.54.

⁸⁸ *See* Ex. 53 at § 2.5; *see also* Ex. 24 at 5.

⁸⁹ Ex. 36 at 27-28, 38-39, 96-97; *see* Ex. 24 at 4-5 ¶¶8-12, 8-16; Fisher II Dep. at 445:19-446:1, 449:4-14, 450:8-20 (Ex. 25); Pls. Ex. 47 at 7.

stream in the IRW.⁹⁰ Moreover, “[i]n the IRW that is dominated by karst geologic features and a mixture of relatively flat landscapes and differentially eroded hillslopes, surface runoff and infiltration will be highly spatially variable [and thus] [e]valuation of runoff potential must be conducted on the single field or sub-field scale.” Ex. 28 at ¶5(g). Furthermore, the soils in the IRW are loamy, and generally do not include clay soils (which might promote overland flow) or sandy soils (which might promote downward movement). *See* Ex. 36 at 55, 64, 72-76, 105.

47. Disputed. This fact (i) is vague, overbroad and argumentative; (ii) is ambiguous as to the relevant time period; (iii) contains an improper legal conclusion; and (iv) the evidence cited does not support the fact as written, in particular as it applies to each individual Defendant. Moreover, scientific analysis has not established that the land application of poultry litter in the IRW can, and does, run-off and leach into water in the IRW. *See infra* at ¶48.

48. Disputed. This fact contains an improper legal argument and conclusion. *See* Okla. Admin. Code §§ 35:17-5-5(a)(7)(C), 35:17-5-5(c). The evidence cited includes the inadmissible opinions of Plaintiffs’ expert⁹¹ and an undisclosed expert witness,⁹² and inadmissible hearsay.⁹³ This fact conflates Defendants’ varied operations, and not all Defendants currently own birds raised in poultry growing operations located within the IRW. *See supra* at ¶¶9(a)-(l). The evidence cited does not support the fact as written.⁹⁴ Moreover, none of the evidence cited

⁹⁰ *See supra* ¶44.

⁹¹ The opinions contained in Pls. Ex. 51 are the subject of *Defendants’ Motion to Exclude the Testimony of Bernard Engel*, Dkt. No. 2056 (May 18, 2009).

⁹² *See supra* at ¶28 n.54.

⁹³ The testimony of Dr. Smolen constitutes inadmissible hearsay, not subject to any exception. *See* Fed. R. Evid. 801; Smolen Dep. at 138:21-139:10 (Pls. Ex. 92).

⁹⁴ Indeed, Plaintiffs’ Exhibit 42 states that “[a]gronomists can’t agree on the movement of phosphate” and does not discuss the run-off or leaching of phosphorus into waters of the State. Plaintiffs’ Exhibit 111 discusses only the general proposition that over-saturated soils may result in phosphorus run-off to streams. It does not discuss the IRW, and therefore, does not support Plaintiffs’ purported fact. Plaintiffs’ citation to Plaintiffs’ Exhibit 79, misrepresents the

demonstrates that phosphorus contained in poultry litter runs-off into the waters of the state. Plaintiffs’ retained experts have not tracked or provided any data to demonstrate the movement of phosphorus from the edge of any field where poultry litter has been applied to any stream in the IRW.⁹⁵ Instead, Plaintiffs’ retained experts merely assume that such movement occurs based on Ms. Smith’s mass balance calculations, Dr. Olsen’s PCA analysis, and Dr. Engel’s field/watershed modeling. But, as detailed in Defendants’ expert reports, each of these novel and untested theories contains serious flaws and limitations that preclude any reliance on the conclusions thereof.⁹⁶ Second, the referenced testimony of government agencies, non-retained experts and Defendants is not supported by any evidence demonstrating the movement of phosphorus in the IRW. These unsupported opinions do not rely on any actual data indicating that any such movement of phosphorus does in fact occur in the IRW. *See* Ex. 36 at 114-17. Third, none of the cited evidence—including the opinions of retained or non-retained experts—quantifies the relative importance of the multiple point and non-point sources of phosphorus in the IRW. *See* Ex. 36 at 25-50; *see also supra* at ¶¶44-45.

49. Disputed. This fact is vague, overbroad and argumentative, particularly with respect to the phrase “very high.” In rendering this unsupported opinion, Dr. Stevenson provides no basis or context for this statement, and has admitted that he did not actually review data for any Oklahoma watersheds outside of the IRW. *See* Stevenson Dep. at 124:13-125:10 (Ex. 58); Ex.

testimony of Preston Keller, who agreed that “only if phosphorus is mismanaged, it causes water quality problems....” Pls. Ex. 79 at 87:15-87:17; 88:8-88:11.

⁹⁵ *See* Fisher II Dep. at 83:12-84:5 (Ex. 25); Ex. 36 at 115; Ex. 28 at ¶¶5(h), 9; *see also* Fisher II Dep. at 87:16-89:13, 217:24-218:7, 266:6-10, 269:17-270:4 (Ex. 25).

⁹⁶ Tyson hereby incorporates the discussion in its expert reports with respect to each of these analyses, rather than repeating them here. *See, e.g.*, Ex. 36 at 95-98 (analyzing flaws in Ms. Smith’s mass balance calculations); *id.* at 81-84 (analyzing flaws in Dr. Olsen’s PCA); Ex. 55 at 1-71 (same); Ex. 56 at 1-51 (same); Ex. 36 at 116 (analyzing flaws in Dr. Engel’s field/watershed modeling); Ex. 57 at 1-50 (same); Ex. 28 at ¶6 (same).

36 at 21. Furthermore, the USGS data relied upon is flawed because a disproportionate number of these stream samples were collected under high flow conditions, during which phosphorus is contributed to stream water from multiple sources, including both point sources and all non-point sources. *See* Ex. 36 at 68-71; *see also id.* at 23-24. Moreover, the levels of phosphorus in streams in the IRW are not unusually high as compared to other streams found throughout Oklahoma, the region and the United States,⁹⁷ and in fact have decreased in recent years.⁹⁸

50. Disputed, in part. This fact (i) is vague and overbroad, particularly with respect to the terms “segments” and “other waters”; and (ii) it is ambiguous as to the time period.

51. Disputed. This fact (i) is vague and argumentative; and (ii) it contains an improper legal conclusion. Moreover, the cited evidence does not relate to each Defendant.

52. Disputed. This fact (i) is vague and argumentative, particularly with respect to the phrases “[e]xcess” and “damages;” (ii) contains an improper legal conclusion; (iii) is not supported by the evidence cited; and (iv) the evidence cited includes Plaintiffs’ experts inadmissible opinions. This fact is immaterial because the evidence cited does not establish that the IRW contains “excess” phosphorus. To the contrary, phosphorus levels in IRW streams are not unusually high as compared to other streams found throughout Oklahoma, the region, and the United States,⁹⁹ and in fact have decreased in recent years.¹⁰⁰ Moreover, the evidence cited does not establish injury to the aquatic environment in the IRW. Again, the evidence contradicts this assertion. For example, most IRW fisheries are healthy and rarely experience benthic algae; algae is associated with waste water discharges, not non-point poultry sources.¹⁰¹

⁹⁷ *See* Ex. 36 at 19; Ex. 53 at § 6.

⁹⁸ *See, e.g.,* Ex. 36 at 91.

⁹⁹ *See* Ex. 36 at 19; Ex. 53 at § 6.

¹⁰⁰ *See, e.g.,* Ex. 36 at 91.

¹⁰¹ *See* Ex. 53 at §§ 3.3, 3.5, 4.5.

53. Disputed. This fact expressly incorporates some of the foregoing facts. Tyson incorporates its corresponding responses. *See supra* at ¶¶27-28, 30-33, 39, 42-26 & 48-50. This fact (i) contains improper legal argument and conclusion, *see* 42 U.S.C. § 9607(a); (ii) is vague and argumentative; (iii) is ambiguous as to the relevant time period; and (iv) is unsupported by the evidence cited. Moreover, Tyson disputes this fact for the reasons stated in Dkt. No. 2184 at 2-4 (June 5, 2009) (Opp. to CERCLA claim).

54. Disputed. This fact (i) contains improper legal argument and conclusion, *see* 27A Okla. Stat. § 2-6-105; 42 U.S.C. § 6972(a)(1)(B); (ii) is vague and argumentative; (iii) is ambiguous as to the relevant time period; and (iv) is unsupported by the evidence cited. This fact expressly incorporates some of the foregoing facts. Tyson incorporates its corresponding responses. *See supra* at ¶¶22-26, 28 30-33, 35, 39, 42-44, 46, & 48-52. Moreover, Tyson disputes this fact for the reasons stated in Dkt. No. 2184 at 2-16 (June 5, 2009) (Opp. to RCRA claim) and Dkt. No. 2185 (June 5, 2009) (Opp. to state law and federal common law claims).

55. Disputed. This fact (i) contains improper legal argument and conclusion, *see* Restatement (Second) of Torts § 427B; (ii) is vague and argumentative; (iii) is ambiguous as to the relevant time period; and (iv) is unsupported by the evidence cited. This fact expressly incorporates some of the foregoing facts. Tyson incorporates its corresponding responses. *See supra* at ¶¶ 5, 9, 10(h), 16, 18-26, 28, 30-39, 41-44, & 46-52. Moreover, Tyson disputes this fact for the reasons stated in Dkt. No. 2185 at 2-15 (June 5, 2009) (Opp. to 427B claim).

56. Disputed. This fact (i) contains improper legal argument and conclusion; (ii) relies on a non-factual pleading,¹⁰² and (iii) is unsupported by the evidence cited.

¹⁰² *See Sierra Club v. U.S. EPA*, 557 F.3d 401, 406-410 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1267 (11th Cir. 2008).

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